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No. 88-1642

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALASKA,

Petitioner,

v.

KENAITZE INDIAN TRIBE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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June 2, 1989

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The Kenaitze Indian Tribe in its opposition to the State of Alaska's petition asserts that the Kenai Peninsula was classified as rural when Alaska's subsistence program was first certified by the Secretary of Interior ("Secretary") as being consistent with the subsistence provisions in the Alaska National Interest Lands Conservation Act, Title VIII, ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371. That is simply incorrect. The state's 1982 regulatory definition of "rural" was not, as described by the Kenaitzes, opp. 8, any area other than a community with

a population of 7,000 or more. Rather, that definition included only areas "outside the road connected area of a borough, municipality, or other community with a population of 7,000 or more." Alaska Admin. Code tit. 5, § 99.020 (effective 5/30/82, Register 82, 1982). Under that definition, the Kenai Peninsula Borough did not qualify as rural, since the peninsula has a population of 25,000 and has been connected by road to Anchorage since 1951. Pet. App. A-5, n.2, and 20. Both the ninth circuit and the Kenaitzes acknowledge that the 1982 certification by the Secretary of consistency between Alaska's program and ANILCA is entitled to deference. Pet. App. A-9; opp. 16. That would necessarily include the determination at that time that the Kenai is not a rural area, and thus one of the main premises underlying the Kenaitzes' opposition is simply invalid.

The Kenaitzes also argue, along with the ninth circuit, that an inconsistency within ANILCA would follow from using the state's definition of "rural area." Pet. App. A-14. ANILCA requires that in times of resource shortage, the subsistence priority is to benefit those with "customary and direct dependence" on the resource in question as "the mainstay of livelihood." 16 U.S.C.A. § 3114 (1985). The Kenaitzes and the ninth circuit reason that if subsistence were limited initially to places where subsistence uses already "dominated" the economy, the secondary priority would be rendered meaningless. Pet. App. A-11. Alaska's definition, however, encompasses places where customary and traditional uses are only "a principal characteristic" of the economy, not just areas "dominated" by such uses. Alaska Stat. 16.05.940(25)

(1987). Indeed, individuals for whom use of a particular fish stock or game population is "the mainstay of livelihood" are given special protection under Alaska Stat. 16.05.258(c) (1987), identical to the protection under ANILCA. 16 U.S.C.A. § 3114 (1985). Thus, the purported internal inconsistency identified by the Kenaitzes and the ninth circuit does not exist.

In their opposition, the Kenaitzes insist that Alaska has grafted an impermissible "community residency requirement" onto ANILCA's definition of subsistence uses. Opp. 6 and 7. There is no citation for that supposed state requirement, probably because it does not exist. In fact, in their opposition the Kenaitzes correctly quote the state definition of "rural area" as "a community *or area* of the state" in which the noncommercial use of fish and game is "a principal characteristic of the economy of the community *or area*." Opp. 7, quoting Alaska Stat. 16.05.940(25) (1987) (emphasis added).

Finally, the Kenaitzes assert that no practical nor legal problems of any consequence follow from the ninth circuit's decision. Quite to the contrary, in its petition Alaska has outlined the significant problems posed by the ninth circuit's decision for the continued viability of Alaska's fish and game populations, as well as the enormous social and jurisdictional problems facing all Alaskans, and federal as well as state agencies. The United States filed an amicus brief in the ninth circuit on behalf of Alaska, and also filed a petition for rehearing in conjunction with the state's similar petition. The state suggests that it would be appropriate for this Court to solicit the views of the United States on the importance of this

matter, both with respect to the real world resource dangers and social and governmental difficulties, and with respect to the legal implications, which range far beyond this set of facts.

For the reasons set out in the petition, and those described here, the ninth circuit's decision should be reviewed and reversed by this Court. The Petition for Writ of Certiorari should be granted, or the decision below should be reversed summarily.

DATED: June 2, 1989

Respectfully submitted,

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